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No. 83-1374

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN CODY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government failed to comply with a defense request for exculpatory evidence.

2. Whether the statute, 29 U.S.C. 186(b), proscribing the receipt by union officials of "things of value" from an employer, requires proof of the employer's intent.

3. Whether the court of appeals applied the correct standard of review in determining whether petitioner was prejudiced by the admission of hearsay testimony.

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OPINION BELOW

The decision of the court of appeals (Pet. App. A2-A23) is reported at 722 F.2d 1052. The decisions of the district court (Pet. App. A25-A36) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1983. A petition for rehearing was denied on December 23, 1983. The petition for a writ of certiorari was filed on February 17, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, peti-

tioner, a union official, was convicted on one count of conducting the affairs of a union local through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (RICO) (Count I); four counts of receiving illegal benefits from employers, in violation of 29 U.S.C. 186(b)(1) (Counts II, IV, V, VI); one count of income tax evasion, in violation of 26 U.S.C. 7201 (Count VII); and one count of filing a false tax return, in violation of 26 U.S.C. 7206(1) (Count VIII).[1] He was sentenced to concurrent terms of five years' imprisonment on the racketeering and tax evasion counts; to a concurrent three-year term on the false filing count; to concurrent one-year terms on each illegal benefits count; and to fines totaling $80,000. The court of appeals reversed petitioner's conviction on one of the illegal benefits counts (Count II) and affirmed the remaining convictions (Pet. App. A23).

As summarized in the opinion of the court of appeals (Pet. App. A5-A8), the government's evidence at trial showed that beginning in 1968 petitioner, who was president of Local 282 of the Teamsters Union and trustee and manager of its pension fund, used his position for self-enrichment through a continuing practice of demanding kickbacks from employers of union members and others, engaging in extortion, and receiving bribes.

The racketeering charge (Count I) was based on evidence showing 12 predicate offenses.[2] Five of these

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[1] Petitioner was acquitted on an additional substantive count (Count III), charging a kickback for influencing the sale of real estate by the union's pension fund, in violation of 18 U.S.C. 1954.

[2] These consisted of the five illegal benefits offenses (Counts II-VI) that were also charged as substantive offenses, and

arose in connection with petitioner's construction of a new home in Southampton, New York, from 1968 through 1970. The evidence showed that petitioner received services valued at $6,653 from a construction company that employed union members, but that he initially paid only $1,900 for them. He paid the remaining amount only after learning from the contractor that a grand jury was conducting an inquiry concerning the outstanding bill. Pet. App. A5-A6. A subcontractor involved in the project also submitted a bill to petitioner that was not paid for several months. When the prime contractor arranged a meeting between the two, petitioner tendered a check in the amount of $4,333.53 but demanded a $3,000 kickback. When, after three months elapsed and the subcontractor persisted in his refusal to refund $3,000, petitioner threatened to ruin his business. After reporting the threat to the FBI, the subcontractor went out of business when his employees voted to join Local 282. Pet. App. A5-A6; Tr. 415-419, 528, 529, 589. Finally, petitioner received a driveway from a paving company at a cost to the contractor of $7,500. When petitioner requested a "break" on the price from a company official, the bill was reduced to $3,230 (Pet. App. A6).[2]

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seven additional acts that were time-barred by the statute of limitations and therefore could not be charged as substantive offenses. The jury returned separate verdicts on each predicate offense specified. Petitioner was found not guilty on one specification of receiving illegal benefits from an employer, as well as not guilty on Count III. He was found guilty on all other charges and specifications.

[2] The normal charge to a customer for work of this sort would have been $9,000 (Tr. 1725).

Two additional RICO predicate offenses proven at trial were kickback schemes involving the disposition of assets of Local 282's pension fund. The first occurred during 1969 and 1970, when the fund's trustees arranged to purchase the Northampton Country Club with fund assets. When petitioner and another trustee learned that the real estate agency handling the transaction was to receive a $175,000 commission, they demanded a $60,000 kickback. In response, the realtor paid $15,000 to petitioner and $3,200 to the other trustee, and invested the balance in real estate. Pet. App. A6. Petitioner engaged in a similar scheme four years later, when he demanded and received a $100,000 kickback from real estate broker John Strong in connection with the pension fund's purchase of a tract of undeveloped land known as the Pine Barrens (Pet. App. A6).

Four additional predicate offenses under Count I, also charged as separate substantive offenses (Counts II, IV, V, VI), were based on evidence showing that petitioner received free chauffeuring service from "no show" employees—members of Local 282 hired by construction firms with union contracts as "working teamster foremen." These employees, though on the payroll of the contractors, had no duties in connection with the contractors' business and devoted their time to providing uninterrupted chauffeuring service to petitioner (Pet. App. A7).

Count II of the indictment was based on evidence showing that, between 1975 and 1977, petitioner and his mistress, Marilyn Taggart, received the rent-free use of a luxury apartment constructed by a contractor, several of whose subcontractors employed members of the union. At trial, evidence concerning the use of the apartment was presented in the form

of Taggart's grand jury testimony, which was admitted under Fed. R. Evid. 804(b)(5), in lieu of her live testimony, because Taggart had fled to Europe to avoid issuance of a subpoena. This testimony was admitted over petitioner's objection. Pet. App. A8-A9, A33-A36.

2. Real estate broker John Strong, who had made kickback payments to petitioner in connection with real estate purchases by the pension fund, began cooperating with the government in July 1979. At that time, he furnished statements and documentary evidence concerning the kickbacks and agreed to tape record conversations between petitioner, himself, and others. On several occasions in late 1979, however, Strong failed to record conversations with the targets of the investigations, began to miss scheduled meetings with the FBI agents conducting the investigation, and disregarded the agents' instructions. During a meeting with the agents in February 1980, Strong expressed reluctance to record further conversations with petitioner. One of the agents, Kenneth Walton, apparently lost his temper and told Strong that, if he did not follow instructions in the future, "he would throw Strong out of the window or inform [petitioner] that Strong was an informant" (Pet. App. A20-A21).

During the grand jury investigation, Strong testified that petitioner had demanded a kickback. However, following petitioner's indictment, Strong ceased cooperating with the authorities and began to assist petitioner in exculpating himself.* At trial, Strong

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*For example, in May 1981 Strong had an accountant prepare a gift tax return reporting the $100,000 kickback he paid petitioner, in the hope that it would prevent petitioner's

recanted his prior statements and grand jury testimony inculpating petitioner in the kickback scheme and testified that the payment was intended for Buzz Schwenk, a local politician (see Tr. 805, 937; Gov't C.A. Br. 9). The government then elicited testimony from Strong concerning his prior testimony and statements to the FBI and presented evidence showing that his conduct as a witness was the result of fear of petitioner (Tr. 765-767, 783-790, 795-796, 926-929, 947, 1057-1068).

After trial, the prosecution became aware of the agents' earlier threats against Strong.[5] Accordingly, an Assistant United States Attorney interviewed Walton and the other agents involved, obtained their accounts of the incident in affidavits, and notified petitioner's counsel of the incident (Pet. App. A27).

Petitioner then moved for dismissal of the indictment and, alternatively, for a new trial under Fed. R. Crim. P. 33, claiming that the government's failure to divulge the threat prior to trial violated his pretrial discovery rights. One of petitioner's pretrial requests had been for "any and all records, memoranda and correspondence between the witness and

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prosecution for tax evasion (Tr. 799-804, 934; GX 45). He also informed a private investigator hired by petitioner that he "intend[ed] to change [his grand jury] testimony * * * because [he] realize[d] it's probably extremely critical in [petitioner's] case" (Tr. 932, 935, 951).

[5] The attorney handling the case submitted an affidavit stating that he had no knowledge of the agents' threat at the time of trial, and the district court accepted that explanation (Feb. 24, 1983 Tr. 34). Nevertheless, the district court concluded as a matter of law that the information, which was "in the hands of the FBI," was therefore "in constructive possession" of the prosecution (Pet. App. A28).

law enforcement authorities which might reasonably reflect on the witness' motives and relationship with the government" (Pet. App. A39). Another request, which apparently was not brought to the attention of the district court in connection with the motion, was for "each statement, promise, assurance or representation made by any governmental authority to any [government] witness which could reasonably give hope for lenient treatment or which could be considered an inducement to cooperate with the government" (*id.* at A40).

The district court denied the motions. Characterizing the discovery demand as merely a general request for exculpatory material, it held that the proper standard under *United States* v. *Agurs*, 427 U.S. 97 (1976), for determining whether a new trial was warranted was whether, when evaluated in the context of the entire record, the evidence in question created a reasonable doubt as to petitioner's guilt that did not otherwise exist (Pet. App. A29). The court then observed that Strong's testimony concerning the $100,000 kickback was relevant to only one out of 12 predicate racketeering acts charged under 18 U.S.C. 1962(c), and that the jury had specifically found that the government had proven five predicate acts, in addition to the Strong kickback. As a result, it concluded, "not only is no reasonable doubt created by the additional evidence (Walton's threat), it is incontrovertably clear that a conviction would have resulted even if the jury had accepted Cody's contention that Strong's trial testimony, rather than his Grand Jury testimony, was truthful" (Pet. App. A29-A30).

3. The court of appeals affirmed the convictions. The court rejected petitioner's claim that the government had not complied with his discovery requests,

for reasons substantially the same as those of the district court. See Pet. App. A20-A23. It also rejected petitioner's claim that his convictions for receiving illegal benefits in the form of chauffeuring services (Counts IV, V, VI) should be reversed because the government failed to prove that the employers of his chauffeurs had intentionally furnished their services to him, and because the district court failed to instruct the jury that such a finding was an element of the offense. The court of appeals held that it was unnecessary for the government to establish the employer's culpability as a predicate to petitioner's. Rather, all that was necessary was "to show that the employers paid, lent, or delivered the chauffeurs, and that [petitioner] accepted their services" (Pet. App. A14-A19).

The court did, however, reverse petitioner's conviction on the illegal benefits count (Count II) that involved acceptance by Taggart of rent-free use of an apartment from a construction company that employed union members. It reasoned that, under 29 U.S.C. 186(b)(1), the government must prove that the company providing the benefit itself employed members of the accused's labor organization, and thus that the government's proof here that various subcontractors were union employers was insufficient (Pet. App. A10-A12). Because it reversed the conviction on this count, the court did not address petitioner's argument that Taggart's grand jury testimony was improperly admitted into evidence. The Taggart testimony applied directly only to Count II, and the court of appeals found, applying the test of *Klein v. Harris*, 667 F.2d 274, 290 (2d Cir. 1981), that the evidence "could not have led a jury to convict on any count other than Count II" and there was "no sub-

stantial possibility of a prejudicial spillover effect" (Pet. App. A17-A18).[6]

ARGUMENT

1. Petitioner contends (Pet. App. 12-16) that his convictions should be reversed because the government failed during pretrial discovery to supply him with information concerning the confrontation between witness Strong and the FBI agents, described at page 5, *supra*. The district court and the court of appeals, both of which focused their attention on the discovery requests explicitly relied upon by petitioner in his motions for dismissal and new trial in district court and brief in the court of appeals,[7] concluded (Pet. App. A21; see also *id.* at A29) that the requests constituted "a general request for exculpatory evidence," subject to the standard set by this Court in *United States* v. *Agurs*, 427 U.S. 97 (1976). Applying that standard, the court of appeals held that re-

[6] Following trial, the district court had conducted a hearing to determine whether petitioner was responsible for Taggart's absence. After reviewing evidence that she had been physically abused by petitioner (Dec. 1, 1982 H. Tr. 7, 41-42, 187), had made repeated calls to petitioner at his union office shortly before return of the indictment (*id.* at 128-129), and had received a large quantity of cash following her flight, at the same time petitioner reported the theft of over $40,000 (*id.* at 65-74, 88-88, 115-116, 176), it found, by clear and convincing evidence, that petitioner had prior knowledge of Taggart's plan to leave the jurisdiction to avoid testifying and that she fled primarily because she feared violent retribution for her testimony (*id.* at 229-232). Relying on *United States* v. *Mastrangelo*, 693 F.2d 269 (2d Cir. 1982), the district court held that, as a result, petitioner had forfeited the right to object to introduction of her grand jury testimony.

[7] These discovery requests are quoted at Pet. App. A21 n.1.

versal of the conviction was not required, because "it cannot be argued that the threats against Strong created 'a reasonable doubt [as to Cody's guilt] that did not otherwise exist.'" Pet. App. A22 (brackets in original) (quoting *Agurs*, 427 U.S. at 112).

Petitioner complains that this conclusion was based on a "fundamental error [by the court of appeals] as to the record" (Pet. 12). He points out—correctly—that he had made another pretrial discovery request not discussed by the district court or the court of appeals, and he contends that that request was specific enough to require scrutiny under a more stringent standard than the *Agurs* rule for nonspecific requests.[8] However, petitioner did not mention that additional discovery request in his brief in the court of appeals. He there relied exclusively on his more general request for records, memoranda, and correspondence "which might reasonably reflect on the witness' motives and relationship with the government" (Pet. C.A. Br. 53)—a request petitioner does not now contend is "specific" enough to necessitate stricter review.[9] Thus, to the extent that the court of appeals applied an incorrect standard, it is di-

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[8] The additional discovery request was for "each statement * * * made by any governmental authority to any [governmental] witness which could reasonably * * * be considered an inducement to cooperate." Pet. 12 (ellipses and brackets in original).

[9] Even beyond being insufficiently specific, this request "sought only documentary material" (Pet. App. A21 n.1). The government had complied with this request "by providing the defense with documents relating to Strong's cooperation" (*ibid.*). The additional information uncovered after trial was testimonial evidence procured by interviewing the FBI agents involved. See *id.* at A27-A29.

rectly attributable to petitioner's own incomplete presentation of the issues to that court.[10]

Petitioner thus raises no question of general importance warranting this Court's review. The legal standards to be applied in circumstances such as these are well settled, and the decision below does not conflict with them. Moreover, even had petitioner properly presented his current argument in the courts below, there can be little question that his convictions would have been affirmed. Where evidence is sought merely for impeachment purposes, it is deemed exculpatory only when "the credibility of the witness may be determinative of a criminal defendant's guilt or innocence." *United States* v. *Starusko*, 729 F.2d 256, 260 (3d Cir. 1984); *United States ex rel Marenza* v. *Gengler*, 574 F.2d 730, 735 (3d Cir. 1978); see also *United States* v. *Phillips*, 664 F.2d 971, 1026 (11 Cir. 1981), cert. denied, 457 U.S. 1136 (1982). By the same token, even where a specific request for impeachment evidence is made, the evidence cannot be deemed material absent a reasonable likelihood that it could have affected the jury's judgment. See *Agurs*, 427 U.S. at 104 (standard for assessing materiality when specific request is made is whether suppressed evidence might have affected outcome of trial). The Strong testimony related solely to one of the RICO predicate offenses on which the jury convicted.[11] As

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[10] Petitioner asserts (Pet. 9) that he raised the issue of the discovery request quoted in note 8, *supra*, in his "briefs" before the court of appeals; however, he did so for the first time in his petition for rehearing in the court of appeals (Pet. for Reh. 3-4). Petitioner does not claim that he raised the issue before the district court in his motion for dismissal or a new trial.

[11] The testimony related to one time-barred offense specified in Count I (described at page 4, *supra*) and to one sub-

only two predicate crimes are needed to obtain a conviction under the RICO statute (see 18 U.S.C. 1961 (1), (5)), and the jury found that petitioner had committed 10 such acts,[12] Strong's testimony could not have affected the verdict. As the district court found (Pet. App. A29-A30):

> not only is no reasonable doubt created by the additional evidence (Walton's threat), it is incontrovertably clear that a conviction would have resulted even if the jury had accepted [petitioner's] contention that Strong's trial testimony, rather than his Grand Jury testimony, was truthful.

Since the information not provided to petitioner was not material to his defense, therefore, the decision of the court below should not be disturbed. See *United States* v. *LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982), cert. denied, No. 82-5571 (Jan. 24, 1983); *United States* v. *Preston*, 608 F.2d 626, 637 (5th Cir. 1979), cert. denied, 446 U.S. 940 (1980).[13]

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stantive charge involving solicitation of a $250,000 kickback on a real estate investment (Count III). Petitioner was acquitted on Count III. That acquittal suggests that petitioner was not prejudiced as the result of the unavailability of the evidence of threats for impeachment purposes.

[12] The district court referred (Pet. App. A29) only to the six time-barred predicate acts specified under Count I but not separately charged. The jury also convicted petitioner of four additional substantive offenses, none of which related to Strong's testimony.

[13] Moreover, the government is not obliged to furnish the defendant information which, with any reasonable diligence, he can obtain himself. See, *e.g.*, *United States* v. *McMahon*, 715 F.2d 496, 501 (11th Cir. 1983), cert. denied, No. 83-5674 (Nov. 28, 1983); *United States* v. *LeRoy*, 687 F.2d at 618 (collecting cases); *United States* v. *Prior*, 546 F.2d 1254, 1259 (5th

2. Petitioner claims (Pet. 16-18) that a union official cannot be convicted of an unlawful receipt of benefits under 29 U.S.C. 186(b)(1) without proof that the employer of the individuals who supplied the benefits "intend[ed] to confer a benefit" on him.[14] This argument is without merit.

Section 186(a) prohibits employers from paying or delivering anything of value to an official of the union representing their workers, and Section 186(b)(1) prohibits union officials from accepting any such payments. As this Court observed in *Arroyo* v. *United States*, 359 U.S. 419, 423-424 (1959) (citations omitted):

> This is not to say that the statute requires mutuality of guilt for the conviction of either the employer or the representative of employees. An

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Cir. 1977) (collecting cases). Although, at the inception of the government's investigation, Strong was a government informant, months before the trial was due to begin he began furnishing information to a defense investigator and, as the district court observed, by the time the trial commenced he was "in [petitioner's] camp" (Feb. 24, 1983 H. Tr. 7-11). Because the defense had ready access to Strong through its investigator, and Strong had allied himself with the defense cause, the district court quite properly found that petitioner had access to information concerning Walton's statements and could have learned of his threats to Strong (assuming he did not in fact actually know of them) through the exercise of due diligence (Pet. App. A30 n.5).

[14] The district court charged the jury that, although it was necessary for the employer to be aware that the services were being used (Tr. 2265), "[t]he fact that the employers tolerated the use of the services to chauffeur [petitioner] is irrelevant." According to the district court, "the focus is on what [petitioner] received. Did he receive a benefit? Did he receive something of value? And did he receive it knowingly, willfully and unlawfully?" (*id.* at 2266).

> employer might be guilty under subsection (a) if he paid money to a representative of employees even though the latter had no intention of accepting. A representative might be guilty if he coerced payments from an innocent and unwilling employer.

Proof that the employer intended to confer a benefit—in the sense that his motive in making the payments in question was to benefit the union representative—is therefore irrelevant to a charge of unlawful receipt of benefits by a union representative. See *United States* v. *Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973); *United States* v. *Ricciardi*, 357 F.2d 91, 99-100 (2d Cir.), cert. denied, 384 U.S. 942 (1966).[15]

Here, the government established at trial that petitioner received the services of chauffeurs, paid by the employer, who did not perform duties for the employer.[16] Employer payments for these services are

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[15] In *Arroyo* itself, the union representative embezzled funds contributed by an employer to a union welfare fund. Since the payments were entirely lawful under 29 U.S.C. 186(c), the "defalcating" official, though guilty under local criminal law, was not guilty of a violation of Section 186(b). 359 U.S. at 427. The employer had not paid for or conferred any benefit on Arroyo; rather, the latter had simply stolen money properly paid to the welfare fund. By contrast, the employer's provision of chauffeurs for petitioner here was not lawful, and receipt of the benefits by petitioner was in violation of Section 186(b) whether or not the employer was a willing participant in the transaction.

[16] Petitioner attempts to characterize the arrangement as involving "part-show" employees, who on their own initiative "served as drivers of the union-owned car used by petitioner in connection with union business" (Pet. 16). The evidence established, however, that the employees provided full-time, all-purpose, chauffeuring services to petitioner. *E.g.*, Tr. 1016-

plainly not payments lawfully permitted under Section 186(c). Moreover, the jury was instructed that the employer had to be "aware that the services were being used," and that they had to find that petitioner "knowingly, willfully and unlawfully requested and accepted the services" (Tr. 2265; see Gov't C.A. Br. 63). Thus, under *Arroyo*, further findings regarding the employers' motivations were unnecessary.

3. Finally, petitioner claims (Pet. 17-18) that the court of appeals applied the incorrect standard of review in assessing whether he was prejudiced by the introduction of certain hearsay testimony. The testimony in question—Marilyn Taggart's grand jury testimony concerning the rent-free apartment supplied by a contractor (see pages 4-5, *supra*)—was admitted by the district court under Fed. R. Evid. 804(b)(5), on a finding of sufficient circumstances of trustworthiness. See Pet. App. A34-A35.

On appeal, the court found it unnecessary to address whether Taggart's testimony was properly admitted because it had set aside, on other grounds, petitioner's conviction on the count to which the testimony principally pertained. Pet. App. A14. Assuming without deciding that the testimony was improperly admitted, the court then rejected petitioner's claim that the spillover effect from the testimony infected the remaining counts as well.[17]

1019, 1032-1040, 1109-1111, 1316, 1488. Petitioner's suggestion (Pet. 17) that "the underlying arrangement between the employer and union member is perfectly legal" is entirely conclusory and, in any event, conflicts with the jury's verdict.

[17] The court stated that "[t]here was no substantial possibility of a prejudicial spillover effect in this case as Taggart's testimony fell almost entirely within the confines of the charges contained in Count II. * * * Hence, assuming that Taggart's

Petitioner contends (Pet. 19-20) that in making this determination the court of appeals improperly failed to apply the test for constitutional harmless error articulated in *Harrington* v. *California*, 395 U.S. 250 (1969). However, in determining that there was no prejudicial spillover effect, the court of appeals expressly relied upon its prior decision in *Klein* v. *Harris*, 667 F.2d 274, 290 (2d Cir. 1981). See Pet. App. A18. *Klein*, in turn, adopted the constitutional harmless error analysis for erroneous admission of testimonial evidence, citing, inter alia, *Harrington* v. *California*, *supra*.[12] 667 F.2d at 290. It is therefore apparent that the court below cited and applied the standard petitioner urges.

In any event, not every erroneous introduction of hearsay evidence constitutes a violation of the Confrontation Clause requiring application of the constitutional harmless error doctrine. In *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) (plurality opinion), a plurality of this Court articulated a number of "indicia of reliability" to be considered in determining whether the Confrontation Clause was violated as the result of the absence of "a satisfactory basis for evaluating the truth of the prior [hearsay] statement" (quoting

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grand jury testimony was inadmissible, it provides no sufficient basis to reverse [petitioner's] convictions on the other counts" (Pet. App. A18). The court of appeals also observed that, although the grand jury testimony alluded to petitioner's use of chauffeurs, the other evidence on the charges stemming from such use was so strong as to render any taint harmless. *Ibid.*

[12] The *Klein* court also cited *Schneble* v. *Florida*, 405 U.S. 427, 432 (1972), and *Chapman* v. *California*, 386 U.S. 18, 24 (1967), both constitutional harmless error cases. 667 F.2d at 290.

California v. *Green*, 399 U.S. 149, 161 (1970)). They include whether the declarant had personal knowledge of the identity and role of the participants in the crime, whether it was likely the declarant was relying upon a faulty recollection, and whether, under the circumstances, there is reason to believe the declarant misrepresented the defendant's involvement (400 U.S. at 88-89). See *United States* v. *Castillo*, 615 F.2d 878, 883 (9th Cir. 1980); *United States* v. *Snow*, 521 F.2d 730, 735-736 (9th Cir. 1975), cert. denied, 423 U.S. 1090 (1976). The focus of the Confrontation Clause analysis is on the "practical concern for the accuracy of the truth-determining process in criminal trials" (400 U.S. at 89). Where pertinent "indicia of reliability" establish that the introduction of hearsay testimony did not violate the Clause, but only a rule of evidence, its prejudicial impact is assessed under the less stringent standard of Fed. R. Crim. P. 52(a). *United States* v. *Castillo*, 615 F.2d at 883.

Applying these criteria, it is plain that the alleged error here was not of constitutional dimension; thus, even if the court below had applied the standard of review pertaining to nonconstitutional claims, its action would have been perfectly proper. First, Taggart's statements were made under oath, reaffirmed in essential details in the course of three separate grand jury appearances, and—despite a continuing close relationship with petitioner—never recanted. Second, from the nature of the testimony—the circumstances under which she had come to occupy the North Shore Towers luxury apartment—it was clear that she had personal knowledge of petitioner's involvement in making the arrangement and highly unlikely that the statement was the product of a faulty

recollection. Third, as found by the district court (Pet. App. A34-A35), Taggart's grand jury testimony was amply corroborated by other documentary and testimonial evidence. Finally, as the district court expressly found (Pet. App. A35), in view of her relationship with petitioner at the time of the grand jury investigation, it is highly unlikely that Taggart would have given testimony tending to incriminate petitioner unless it was truthful.[19]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[19] Moreover, as the district court concluded (Dec. 1, 1982 H. Tr. 229-232), petitioner was in part responsible for Taggart's decision to flee the country. See note 8, *supra*. Thus, petitioner waived his right to object to introduction of her grand jury testimony. See, *e.g.*, *United States* v. *Mastrangelo*, 722 F.2d 12 (2d Cir. 1983), petition for cert. pending, No. 83-1365; *Steele* v. *Taylor*, 684 F.2d 1193 (6th Cir. 1982), cert. denied, No. 82-6902 (Mar. 28, 1983); *United States* v. *Thevis*, 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008 (1982).